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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

8 Mary S. Garrow,

9 Plaintiff,

10 vs.

11 Tucson Clips, LLC, doing business as

12 Great Clips,

13 Defendant.

) No. CV 22-00243-TUC-RM (LAB)

) REPORT AND RECOMMENDATION

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15 Pending before the court is a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6),

16 filed on September 8, 2022, by the defendant, Tucson Clips (“Clips”). (Doc. 8) The

17 plaintiff, Mary Garrow, filed a response on October 31, 2022. (Doc. 15) Clips filed a reply

18 on November 10, 2022. (Doc. 18)

19 The case has been referred to the Magistrate Judge for report and recommendation in

20 accordance with 28 U.S.C. § 636(b)(1) and LRCiv. 72.1 and 72.2. (Doc. 7) A hearing on

21 the motion was held on December 7, 2022. (Doc. 20)

22 The plaintiff, Garrow, maintains that she suffered discrimination while working as a

23 hair stylist at Great Clips. (Doc. 1) On January 14, 2021, Garrow filed a charge of

24 discrimination with the Arizona Attorney General’s Office. (Doc. 8-3, p. 2) On February

25 10, 2021, Garrow filed a report with the Marana Police Department charging the General

26 Manager Acevedo and others with false imprisonment. (Doc. 1, p. 3); *see* (Doc. 8-2)

27 Apparently, at the end of the work day, Acevedo decided to address a complaint that a

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1 customer had previously filed against Garrow. (Doc. 8-2) Garrow reported that the doors
2 were locked during the meeting preventing her from leaving. *Id.* Acevedo denied her
3 allegations. *Id.* The Marana Police Department concluded that probable cause was lacking
4 and the incident would not be referred for prosecution. *Id.* Shortly afterwards, Garrow was
5 terminated. (Doc. 1, p. 3)

6 On May 23, 2022, Garrow filed in this court a Complaint, which is separated into four
7 claims: (1) Discrimination: Race/Age; (2) Retaliation; (3) Preferential Treatment, Under Title
8 VII; and (4) Intentional Infliction of Emotional Distress (IIED). (Doc. 1, pp. 2-3) She
9 maintains that she received a “Right to Sue” letter dated February 16, 2022, but she did not
10 attach the letter to her Complaint. (Doc. 1, p. 2)

11 On September 8, 2022, Clips filed the pending motion to dismiss pursuant to
12 Fed.R.Civ.P. 12(b)(6). (Doc. 8) Clips argues generally that the Complaint fails to provide
13 a “short and plain statement of the claim showing that she is entitled to relief” in accordance
14 with Rule 8(a)(2). (Doc. 8, p. 2) Clips further asserts that the Complaint must be dismissed
15 because, on December 20, 2021, Garrow entered into a Settlement Agreement with Clips
16 releasing all of her claims in exchange for \$6,000. (Doc. 8, pp. 9-10); *see* (Doc. 8-3). Clips
17 attached a copy of the Settlement Agreement to its motion to dismiss. (Doc. 8-3) Garrow
18 did not attach it to her Complaint.

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20 Discussion

21 “A Rule 12(b)(6) motion tests the legal sufficiency of the claim.” *Cook v. Brewer*,
22 637 F.3d 1002, 1004 (9th Cir. 2011). The claim must allege a legally cognizable theory of
23 relief and include factual allegations sufficient to support that theory. *Hinds Investments*,
24 *L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011).

25 “[O]n a motion to dismiss, the court presumes that the facts alleged by the plaintiff
26 are true.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013). The court need not,
27 however, “assume the truth of legal conclusions cast in the form of factual allegations.” *Id.*
28 at 1248.

1 To survive the motion to dismiss, “[f]actual allegations must be enough to raise a right
2 to relief above the speculative level . . . on the assumption that all the allegations in the
3 complaint are true even if doubtful in fact.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
4 555, 127 S.Ct. 1955, 1965 (2007) (internal punctuation omitted). “[A] well-pleaded
5 complaint may proceed even if it strikes a savvy judge that actual proof of those facts is
6 improbable, and that a recovery is very remote and unlikely.” *Id.* at 556, 1965 (internal
7 punctuation omitted).

8 “Generally, courts may not consider material outside the complaint when ruling on a
9 motion to dismiss.” *Young v. AmeriGas Propane, Inc.*, 2014 WL 5092878, at *3 (S.D. Cal.
10 Oct. 9, 2014). However, “under the doctrine of incorporation by reference, courts may
11 consider extrinsic documents if they are ‘integral’ to the plaintiff’s claims and their
12 authenticity is not in dispute.” *Birdsong v. AT & T Corp.*, 2013 WL 1120783, at *2 (N.D.
13 Cal. Mar. 18, 2013).

14 In this case, Clips asserts in its motion to dismiss that the Settlement Agreement bars
15 all of Garrow’s claims. (Doc. 8) Garrow argues in her response that the document does not
16 bar her claims, but she does not dispute its authenticity. (Doc. 15) The Settlement
17 Agreement “is an integral part of her allegations, for she would have no valid claims unless
18 the [Settlement Agreement] did not bar them.” *Birdsong v. AT & T Corp.*, 2013 WL
19 1120783, at *2 (N.D. Cal. Mar. 18, 2013). Accordingly, the court will consider the
20 Settlement Agreement when ruling on the pending motion to dismiss.

21 As the court noted above, Garrow filed a Charge of Discrimination with the Arizona
22 Attorney General’s Office on January 14, 2021. (Doc 8-3, p. 2) On February 10, 2021,
23 Garrow filed a report with the Marana Police Department charging the General Manager
24 Acevedo and others with false imprisonment. (Doc. 1, p. 3); *see* (Doc. 8-2) Shortly
25 afterwards, Garrow was terminated. (Doc. 1, p. 3) “In November of 2021, upon being
26 advised by governmental agencies that they were unable to establish probable cause of
27 unlawful discrimination, [Garrow] approached [Clips] seeking to resolve the dispute without
28 either Party admitting liability.” (Doc. 8-3, p. 2) On December 20, 2021, the parties entered

1 into a Confidential Settlement Agreement and Release (“Settlement Agreement”) in which
2 Garrow released any claims she had against Clips that occurred prior to the date of the
3 agreement in exchange for \$6,000.00. (Doc. 8, p. 11); (Doc. 8-3) She explicitly waived any
4 claims under the ADE, ADEA and Title VII “as well as under any other statute or common
5 law principles of similar effect.” *Id.*, p. 4.

6 Nevertheless, “after Plaintiff deposited the settlement check, she proceeded to file [on
7 January 7, 2022] a breach of contract action in Pima County Justice Court¹ against Tucson
8 Clips asking that court to ‘strike the unconscionable part of the contract or agreement
9 settlement unilateral’ and demanding \$8,000.00 in relief.” (Doc. 8, p. 10), (Doc. 8-4, pp. 3-
10 4) Garrow asserted that Clips intentionally delayed payment of the check, breached the
11 “unilateral (one sided)” contract, and committed “non communication, bad faith, non
12 performance, [and] deceitful misrepresentation.” (Doc. 8-4, p. 4) She further alleged that
13 her copy of the agreement omitted pages seven and eight and she never received a copy of
14 the parties’ signatures. *Id.*

15 Apparently, delivery of the settlement check, which was cut on December 30, 2021,
16 was delayed due to the holiday season. (Doc. 18-1, p. 12) It was eventually delivered on
17 January 5, 2022 “within the time period stated in the Settlement Agreement.” (Doc. 18-1,
18 p. 12) Garrow “refused” to give Clips her email address, so a hard copy of the Settlement
19 Agreement had to be sent by mail. *Id.* The hard copy, however, was inadvertently omitted
20 from the envelope that contained the check. *Id.* Clips provided Garrow with a complete
21 copy of the Agreement when Garrow filed her complaint in Justice Court and it learned of
22 the oversight. *Id.*

23 On July 29, 2022, the Justice Court granted Clips’s motion to dismiss the action with
24 prejudice. (Doc. 8, p. 10); (Doc. 8-5); (Doc. 9, p. 1) It awarded sanctions against Garrow
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27 ¹ This court may take judicial notice of prior litigation. *Reyn’s Pasta Bella, LLC v. Visa*
28 *USA, Inc.*, 442 F.3d 741, 746, n. 6 (9th Cir. 2006) (Court took judicial notice of prior litigation,
which found that the prior settlement was “fair, reasonable, and adequate.”).

1 in the amount of \$5,000 for bringing the lawsuit in violation of the Settlement Agreement.

2 *Id.*

3 Previously, on May 23, 2022, Garrow filed the pending Complaint in this court
4 alleging discrimination. (Doc. 1) Clips's counsel cautioned Garrow that if she insisted on
5 pursuing this action in federal court after her loss in Justice Court, "a similar result would be
6 likely." (Doc. 9, p. 4) Nevertheless, on August 19, 2022, Garrow served the pending
7 Complaint on Clips. *Id.* On September 8, 2022, Clips filed the pending motion to dismiss
8 and pending motion for sanctions. (Doc. 8); (Doc. 9)

9 It appears that all of Garrow's claims are precluded because of the Settlement
10 Agreement. (Doc. 8-3); *see, e.g., Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 848 (9th Cir.
11 2004) ("The district court was correct to find the Settlement Agreement enforceable against
12 [the employee] and we affirm the grant of summary judgment to [the employer] on [the
13 employee's] state law and ADA claims relating to the acts that took place prior to execution
14 of that agreement."). The claims in the Complaint accrued prior to the date of the Settlement
15 Agreement. (Doc. 1) And Clips performed its obligation to deliver the \$6,000.00. (Doc. 8-
16 4, p. 5); (Doc. 8, p. 10) This court, however, need not decide for itself whether or not the
17 Settlement Agreement is valid and enforceable. The Pima County Justice Court has already
18 decided that, and Garrow cannot pursue a second action in federal court seeking a different
19 result. (Doc. 8-5); *see Hastings v. Grundy*, 2020 WL 5517303, at *3 (D. Ariz. Sept. 14,
20 2020) ("In Arizona, the doctrine of claim preclusion, or res judicata, prevents a plaintiff
21 from bringing a second lawsuit when a prior judgment on the merits was rendered by a court
22 of competent jurisdiction and the matter now in issue between the same parties or their
23 privities was, or might have been, determined in the former action.") (punctuation modified);
24 *see, e.g., Derringer v. Sewell*, 2009 WL 1578292, at *3 (D. Ariz. June 3, 2009) (Replevin
25 and tort claims brought in federal court were previously litigated in justice court and barred
26 by res judicata.). The motion to dismiss should be granted.

27 In her response, Garrow asserts generally that she has a Fourteenth Amendment right
28 to due process and equal protection and a Seventh Amendment right to a trial by jury for

1 “suits at common law.” (Doc. 15) She does not explain, however, how those rights apply
 2 here. The court’s application of res judicata does not appear to violate her due process rights.
 3 She already has had her “day in court.” *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779
 4 (1999) (Due process “dictates that a party has the right to be heard,” but a lawsuit will be
 5 precluded if “a former judgment on the merits was rendered by a court of competent
 6 jurisdiction and the matter now in issue” is “between the same parties or their privities.”).
 7 Moreover, constitutional rights may be waived, and Garrow has done so. *See Fuller v. City*
 8 *of Oakland, Cal.*, 47 F.3d 1522, 1530 (9th Cir. 1995), as amended (Apr. 24, 1995) (“There
 9 is no dispute that the Seventh Amendment right to a jury trial, like other constitutional rights,
 10 can be waived.”)

11 Garrow further argues that Clips breached the contract by “non-performance, non-
 12 communication, and the untimely delivery of the executed signature page of the contract.”
 13 (Doc. 15, p. 2) She provides, however, no further explanation or citation to relevant
 14 authority. Finally, Garrow asserts that she was engaged in a protected activity and has a valid
 15 cause of action pursuant to Title VII. *Id.*

16 Some of Garrow’s arguments were raised previously in Justice Court. Some are new.
 17 All of them are precluded. *See Hastings v. Grundy*, 2020 WL 5517303, at *3 (D. Ariz. Sept.
 18 14, 2020) (Res judicata applies to issues that were previously decided in a former action or
 19 “might have been.”).

20 21 RECOMMENDATION

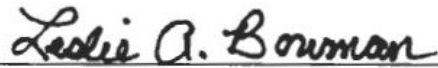
22 The Magistrate Judge recommends that the District Court, after its independent review
 23 of the record, enter an order

24 GRANTING the defendant’s motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6),
 25 filed on September 8, 2022. (Doc. 8)

26 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
 27 14 days of being served with a copy of this report and recommendation. If objections are
 28 not timely filed, the party’s right to de novo review may be waived. The Local Rules permit

1 the filing of a response to an objection. They do not permit the filing of a reply to a response
2 without the permission of the District Court.

3 DATED this 14th day of December, 2022.

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7 Leslie A. Bowman
8 United States Magistrate Judge
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